Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Misuse of Internet Protocol (IP) Captioned Telephone Service	)	CG Docket No. 13-24
	)	
Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	)	CG Docket No. 03-123

REPLY COMMENTS OF IDT TELECOM, INC.

I. No Federal-State Joint Board Is Required To Merely Expand The Funding Base For IP CTS

In Paragraphs 106 and 107 of the Further Notice of Proposed Rulemaking in this docket ("*FNPRM*"),[1] the Commission describes two possible methodologies for expanding the IP CTS Fund contribution base to include intrastate revenues.[2] The Commission effectively concluded that the single-factor methodology described in paragraph 106[3] would not need to be referred to a Federal-State Joint Board on Separations ("Joint Board").[4] Regarding the multiple-factor methodology described in paragraph 107, the Commission asked several questions:

> [W]hether [identifying the interstate and intrastate portions of IP CTS minutes and provider costs] is necessary to ensure that the burden of TRS Fund contributions is distributed equitably among voice service providers and consistently with section 225. If so, how should such separation of IP CTS costs and minutes be determined? Are the current separations rules adequate to separate intrastate and interstate IP CTS costs, or would it be necessary to refer this issue to the Federal-State Joint Board on Separations?[5]

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[1] *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 13-24, 03-123, Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking, and Notice of Inquiry, FCC No. 18-79 (rel. June 8, 2018) ("*FNPRM*").

[2] *FNPRM* at ¶¶ 106-07.

[3] IDT refers to these proposed methodologies as the single-factor and multiple-factor methodologies.

[4] *See*, *FNPRM* at ¶ 106.

[5] *FNPRM* at ¶ 107.

The Commission then went on, in footnote 305, to observe that the statutory scheme established by Section 225 for joint federal and state administration of TRS is separate – and significantly different from – the Communications Act's traditional division of jurisdictional responsibilities over wireline telecommunications service which necessitates jurisdictional separations rules. No commenter in support of a Joint Board referral specifically addresses the above questions and no commenter counters the arguments and the facts regarding past actions taken by the Commission as discussed in footnote 305.

Rather, a few commenters simply assert that neither proposed methodology can be implemented without first referring the matter to the Federal-State Joint Board.[6] In fact, however, no such referral is required for the single-factor methodology supported by IDT, for the reasons detailed below.

First and foremost, the Communications Act carves out special treatment for telecommunications relay services ("TRS") – the Act explicitly grants to the Commission jurisdiction over carriers engaged in intrastate communications for purposes of administering TRS regulations. Regardless of any jurisdictional limitations that may be imposed by other sections of the Communications Act with respect to other services, Section 225(b)(2) specifically states:

> For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this subchapter with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this chapter by a common carrier engaged in interstate communication.

Second, the Communications Act is clear regarding when a Federal-State Joint Board is or is not required and one is not required for the single-factor methodology. Section 410 authorizes three means by which the Commission can consult with state representatives on regulatory matters. Sec. 410(a) permits (but does not require) the

[6] *See, e.g.,* National Association of Regulatory Utility Commissioners Comments, CG Docket Nos. 13-24 and 03-123, at 14 (filed Sept. 17, 2018) ("NARUC Comments") ("Section 410 only discusses Joint Boards and includes a mandatory instruction that changes to separations must be referred to the Board for a recommended decision. The reference in § 225(3)(A)[sic] can mean nothing else.") *See also,* Pennsylvania PUC Comments, CG Docket Nos. 13-24 and 03-123, at 19 (filed Sept. 17, 2018) ("PA PUC Comments") ("If, however, the Commission elects to expand the IP CTS contribution base to include a percentage of annual intrastate revenues from telecommunications carriers and VoIP service providers for the TRS Fund, the Commission must first refer the matter to the Federal-State Joint Board on Separations for its expertise in determining accurate separations of costs between interstate and intrastate revenues and develop a cost-based compensation rate. This is a prerequisite under Section 225(d)(3).")

Commission to refer matters to boards comprised of representatives from multiple states and Sec. 410(b) permits (but does not require) the Commission to "confer" with State regulatory commissions and hold joint hearings. It is only Sec. 410(c) that *requires* federal-state consultation and provides for a Federal-State Joint Board.

Specifically, Sec. 410(c) provides that the Commission "shall" refer a proceeding to a Federal-State Joint Board but only when a proceeding concerns "the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations." Thus, for example, when a carrier is subject to rate of return regulation and the same carrier facility is used to provide both interstate and intrastate services, a Federal-State Joint Board is required to allocate the costs of that facility between the state and federal jurisdictions so that the regulators in each jurisdiction can set rates which, in combination, do not allow carriers to over-recover, or force them to under-recover, their costs. Jurisdictional cost allocation ensures that the carrier recovers all its costs plus a reasonable return on its investment *in toto*.[7]

No Federal-State Joint Board is required nor is one necessary to change the carrier revenue base used to calculate each carrier's contribution to the TRS fund for IP CTS services. The current TRS contribution methodology – which did not result from any referral to a Joint Board[8] - requires carriers to make dollar contributions to the TRS Fund. This would not change under the proposed single-factor methodology. How carriers recover that contribution from their end users – whether their "pass through" charges are per minute, per month, from interstate users, from intrastate users, from both, from carrier customers, etc. – has never been addressed by the Commission, although the FCC does prohibit carriers from specifically identifying a charge on customer bills as one for relay services.

The amount of each carrier's dollar contribution is calculated by applying a percentage factor to its interstate and international revenues and the percentage factor is calculated by totaling the revenue requirement *(i.e.,* costs) for all IP CTS services – intrastate, interstate and international. That multi-jurisdictional IP CTS revenue

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[7] "Jurisdictional separations is the process by which incumbent local exchange carriers (LECs) apportion regulated costs between the intrastate and interstate jurisdictions. Historically, one of the primary purposes of the separations process has been to prevent incumbent LECs from recovering the same costs in both the interstate and intrastate jurisdictions. The jurisdictional separations process itself has two parts. In the first step, incumbent LECs assign regulated costs to various categories… .In the second step, the costs in each category are apportioned between the intrastate and interstate jurisdictions….For example, loop costs are allocated by a fixed allocator, which allocates 25 percent of the loop costs to the interstate jurisdiction and 75 percent of the costs to the intrastate jurisdiction." *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Dkt. No. 80-286, Report and Order, 24 FCC Rcd. 6162, 6162-3 (2009).

[8] Likewise, the "temporary" contribution methodology for IP CTS was not referred to a Joint Board. To the best of IDT's knowledge, no party to this proceeding protested (then or now) that decision. Moreover, no party to this proceeding has articulated how the present contribution methodology – which supports the provision of intrastate, interstate, and international IP CTS from interstate and international revenue, without any separation of costs and/or payments between the *three* jurisdictions, is lawful whereas the decision to include intrastate revenue within the contribution base is not.

requirement is divided by a base amount consisting of all carriers' reported interstate and international revenues for all telecom services, not just TRS services like IP CTS. In other words, the percentage factor is calculated by spreading the total IP CTS revenue requirement for all jurisdictions across a base of revenues from all jurisdictions for telecom and VOIP services.[9]

Under the current system as well as the proposed single-factor methodology, the cost of IP CTS services is *not* allocated between the jurisdictions. The FCC-administered TRS Fund is set at whatever level covers the costs/revenue requirement for all jurisdictions of IP CTS services, not the individual costs associated with each of the three jurisdictions. The FCC simply uses the dollar amount generated by all carrier contributions to pay for all IP CTS services – intrastate, interstate and international – on the same basis.

The proposal to change the way the Commission calculates the percentage factor does not require the Commission to allocate IP CTS costs between the three jurisdictions. The proposal would expand the revenue base used to set the percentage carrier contribution factor. Changes to the calculation of that percentage factor affect the specific dollar amounts paid by each carrier into the fund. Expanding the revenue base used to calculate the percentage carrier contribution factor will reduce the *percentage* amount and may reduce or increase the *dollar* amounts paid by each contributing carrier depending on their particular mix of interstate and intrastate revenues. But changes in contribution amounts are not based on and do not reflect any allocation of IP CTS costs between the jurisdictions. Accordingly, no Federal-State Joint Board is required for the Commission to adjust its own funding mechanism for IP CTS.

II. Under Section 225(d)(3), A Joint Board Referral Is Not Required

IDT pointed out in its Initial Comments that it is unnecessary to consider whether the proposed IPCTS methodology requires a Joint Board referral because the statutory language regarding jurisdictional separations of relay service costs applies *only* to the recovery of relay service costs incurred by common carriers from their end-user subscribers and *not* to the recovery of relay service costs incurred by the Fund from common carrier contributors. And it is this latter issue – and *not* the former – which is presented in this proceeding. Commenters supporting a Joint Board referral ignore the plain language of the statute. For example, the PA PUC states "[the FCC] must first refer this issue to the Federal-State Joint Board on Separations as required by Section 410 of the Communications Act … and 47 U.S.C. § 225(d)(3)(A) of the Act."[10] NARUC makes the same error when it states "[C]ongress did not mince words in § 225(3)(A) [*sic*] … The reference in § 225(3)(A) [*sic*] can mean nothing else."[11] But it *does* mean something else. This is because of the language which follows in 47 U.S.C. § 225(d)(3)(B):

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[9] *FNPRM* at ¶ ¶ 106-07.

[10] PA PUC at 4.

[11] NARUC at 14.

> Such regulations [*i.e.,* regulations resulting from a Joint Board referral] shall generally provide that costs caused by interstate telecommunications relay services *shall be recovered from all subscribers* for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f), a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.[12]

Pursuant to the statute, then, the regulations requiring referral to a Joint Board are those that would apply to cost recovery by common carriers *"from all subscribers"* - not to the creation of a fund with contributions "from all common carriers." The issue raised in the *FNPRM* concerns the Commission's cost recovery from common carriers and *not* common carriers' cost recovery requirements from "all subscribers."

Further supporting IDT's statutory interpretation is that the second sentence of subsection (B) – whose purpose is to allow for state programs to recover costs in a manner consistent with the federal program – explicitly states that the rights and obligations contained in the prior sentence extend to "common carriers" who incur costs providing intrastate relay services. When read closely, and (most importantly) *together*, subsections (A) and (B) of 47 U.S.C. § 225(d)(3) make clear that the Joint Board language applies only to rules governing common carriers' recovery of relay service costs from all end-user subscribers. For this reason, the answer to the question of how the Commission chooses to recover the costs of the IP CTS Fund from common carriers cannot be determined under an analysis of 47 U.S.C. § 225(d)(3).

Finally, to the extent that the Commission is interested in developing a contribution methodology that requires the jurisdictional allocation of costs, which *would* require referral to a Federal-State Joint Board, IDT urges the Commission to adopt the single-factor methodology while any such Federal-State Joint Board referral is in process. As both the Commission and its state counterparts know only too well, Federal-State Joint Boards can be some of the most, if not *the* most, time-consuming processes in which the Commission engages. The single-factor methodology is a vast improvement over the status quo in terms of a just, reasonable, equitable, and economically efficient contribution methodology. Indeed, the stability and sufficiency of the TRS fund itself is at grave risk now that the interstate telecommunications revenue base on which the current system rests is shrinking at an unprecedented rate. To preserve the fund and to treat contributors more fairly, the Commission must adopt the single-factor methodology immediately and ameliorate the damage that would be done to the fund and its contributors by the kind of delay that would inevitably result from any unnecessary joint board referral.

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[12] 47 U.S.C. § 225(d)(3)(B) (Emphasis added) (Parenthetical added).

III. Whether IP CTS Constitutes "Telecommunications" Or An "Information Service" Is Irrelevant To Whether The FCC Has Jurisdiction Over Contributions to the IP CTS Fund

In IDT's Initial Comments, IDT stated, "IP CTS is a Telecommunications Relay Service. It has always been thus and it should remain so … TRS is a term defined under 47 U.S.C. Sec. 225(a)(3) and IP CTS has been determined by the Commission to be a TRS."[13] Yet some commenters have argued that the Commission cannot expand the revenue base for calculating the percentage contribution factor for an IP CTS Fund until the Commission determines whether IP CTS constitutes "telecommunications" or an "information service" under the Communications Act.[14] This "definitional" issue is a red herring. The Commission's authority over IP CTS derives from Section 225 of the Act, not from any general authority over "telecommunications" conferred by Title II which must be distinguished from the Commission's ancillary authority over non-telecommunications services such as "information services." Section 225(a) defines "telecommunications relay services" and Section 225(b) commands the Commission to ensure that those services are available. Section 225 is thus a specific grant of jurisdiction to the FCC over TRS and any claim to the contrary must fail.[15]

IV. The Relay Service User and Provider Communities Support Expanding the IP CTS Contribution Base

A filing by thirteen organizations which represent the relay service user community states that "[a]s long as the federal government administers and funds intrastate IP CTS, it should include intrastate revenue when it calculates carrier contributions to the TRS Fund base."[16] Also of note, none of the other filers representing the relay service user community oppose the FCC's proposal. Relay service provider commenters support the IDT proposal as well. Caption Call states, "CaptionCall supports the Commission's proposal to expand the TRS Fund base to

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[13] IDT Telecom, Inc. Comments, CG Docket Nos. 13-24 and 03-123, at 17 (filed Sept. 17, 2018) ("IDT Comments") (Internal footnotes omitted).

[14] *See*, PA PUC Comments at p. 8 ("The regulatory uncertainty regarding whether IP CTS, which is an IP-enabled service, is an information service or a telecommunications service, raises the question as to whether IP CTS calls should be reimbursed by a state or the Interstate TRS Fund.") *See also*, National Association for State Relay Administration Comments, CG Docket Nos. 13-24 and 03-123, at 3 (filed Sept. 17, 2018) ("NASRA Comments") ("[T]his proposed solution to include intrastate revenues does nothing to address jurisdictional separations or the legal basis to access intrastate revenues for a service provided over the internet *which has been declared an information service*. The FCC should first address how *an information service* could be funded by way of intrastate revenues that are not under the jurisdiction of the FCC.") (Emphasis added).

[15] As noted above, providers of telecommunications relay services are providers of… telecommunications relay services. Telecommunications relay service providers are not, by providing those services, required to register with the FCC as interstate telecommunications service providers, to obtain FCC Form 499 Filer ID numbers, or to contribute to the FCC's USF, NANPA, LNPA, or TRS funds like providers of telecommunications, interconnected VOIP, or non-interconnected VOIP.

[16] Hearing Loss Association of America, *et al* Comments, CG Docket Nos. 13-24 and 03-123, at 24 (filed Sept. 17, 2018).

include intrastate revenues."[17] And ClearCaptions adds, "ClearCaptions supports the Commission's proposal to expand the TRS Fund base through the inclusion of a percentage of annual intrastate revenues from telecommunications carriers and … [VOIP] providers."[18] Of note, no relay service provider opposes the FCC's proposal. IDT believes that this support is critical because it is these two constituencies who are most aware of the funding crisis facing relay services and most likely to be harmed if the crisis is not averted. The fact that both communities support the FCC's proposal is a strong indication of its inherent wisdom.

V. The Commission Cannot Rely Solely on Cost Reduction and Fraud Prevention to Solve its IP CTS Problem

In its Initial Comments, IDT addressed NARUC's recent Resolution regarding base expansion and its position on cost reduction and fraud prevention. Specifically, IDT observed that NARUC seemed to assume that reducing cost and fraud would address all funding concerns, in the absence of any documentation or other evidence to support that view. But even if reducing costs and fraud brings the IP CTS budget under control, those outcomes would still fail to address the fact that the Commission intended its decision to fund intrastate IP CTS only from the interstate and international jurisdictions as a temporary measure, a temporary measure that has now been in place for over a decade – an extended period of time which IDT asserts is unreasonable and unlawful.[19] In its Comments, NARUC repeats this argument for delay.[20] A few commenters[21] mirror NARUC's comments. But they, like NARUC, fail to proffer any evidence demonstrating the dollar impact of the reforms they highlight and how that impact eliminates the need for the contribution reform proposed by the Commission.

Equally important, the commenters are silent on the issues IDT raised which demonstrate *why* the Commission cannot rely on cost reduction and fraud prevention alone, namely, that (1) the present cost recovery mechanism was intended to be "temporary" yet has been in place for more than a decade; (2) contribution reform is necessary to address this legal infirmity; and (3) the present contribution base is shrinking at an unprecedented rate. As a matter of law and of responsible fiscal

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[17] CaptionCall Comments, CG Docket Nos. 13-24 and 03-123, at FN. 45 (filed Sept. 17, 2018).

[18] ClearCaptions Comments, CG Docket Nos. 13-24 and 03-123, at 23 (filed Sept. 17, 2018).

[19] IDT Comments at 16.

[20] NARUC Comments at 10 ("it makes no sense … to consider shifting the funding mechanism or any increases in the base [until several issues have been addressed].")

[21] *See*, Colorado Public Utilities Commission Comments, CG Docket Nos. 13-24 and 03-123, at 2-3 ("Colorado Comments"): ("The FCC should prioritize curbing the waste and abuse of IP CTS before shifting its focus to … altering the contribution base to fund IP CTS using intrastate revenues."); NASRA Comments at 3 ("[NASRA] is opposed at this time to expand the IP CTS contribution base to include annual intrastate revenues without first addressing the jurisdictional nature of IP CTS traffic."); and Utah Public Service Commission Comments, CG Docket Nos. 13-24 and 03-123 at 2 ("[R]ather than increase the funding sources of IP CTS, the FCC should continue directing efforts to thwart the waste and abuse of the service….")

management of the Fund, the Commission cannot rely solely on speculative claims of cost savings to preserve the Fund and ensure its future viability. The Commission's proposals for cost reduction and fraud prevention *in conjunction with* contribution reform are the only way to ensure that IP CTS and all relay services are available to all who need them and that service providers have an opportunity to offer their services in every state and be compensated at a fair, predictable rate for their services.

VI. State-Regulation of "Intrastate" IP CTS Is Neither An Immediate Nor Near-Term Solution

In our Initial Comments, IDT stated, "IDT does not take a position on whether states should be required or allowed to manage and compensate intrastate IP CTS. However, we very strongly take the position that if the Commission were to transfer authority, it should not allow the time necessary for an orderly transition to delay the immediate relief sought by IDT."[22] Comments filed by various state relay administrators and regulators make it clear that regulation of intrastate IP CTS cannot be accomplished in anything remotely considered to be "near-term." For example, the Arizona Commission for the Deaf and Hard of Hearing states that "[the] time is not, however, now"[23] and that the FCC "will need to address many logistical issues, many of which will take significant time and effort."[24] The California Public Utilities Commission states that before it would support state IP CTS administration only if "a number of critical issues are addressed first."[25] Similarly, the Colorado Public Utilities Commission states that it "cannot meaningfully and comprehensively comment on this proposal until states receive state-specific data and information necessary to determine what state-level administration could possibly look like."[26] The Kansas Corporation Commission states that it "would not be desirable to implement state administration of the IP-CTS portion of the TRS program before identifying and reducing waste, fraud and abuse …."[27] The Nebraska Public Service Commission flatly states that "Nebraska Law Does Not Allow the NPSC to Administer IP CTS."[28] The New Mexico Commission for Deaf and Hard of Hearing Persons expresses concern that only after the Commission addressed its concerns about funding, interoperability and rates would it "explore the possibility of taking on the responsibility of contracting and providing IPCTS within the state."[29] The Pennsylvania PUC notes that it is not clear whether applicable statutes

[22] IDT Comments at 14.

[23] Arizona Commission for the Deaf and the Hard of Hearing Comments, CG Docket Nos. 13-24 and 03-123, at 2 (filed Sept. 17, 2018).

[24] *Id.* at 3.

[25] California Public Utilities Commission Comments, CG Docket Nos. 13-24 and 03-123, at 7.

[26] Colorado Comments at 6-7 (footnotes omitted).

[27] Kansas Corporation Commission Comments, CG Docket Nos. 13-24 and 03-123, at 2.

[28] Nebraska Public Service Commission Comments, CG Docket Nos. 13-24 and 03-123, at 2.

[29] New Mexico Commission for the Deaf and Hard of Hearing Persons, CG Docket Nos. 13-24 and 03-123, at 6.

permit it to administer functions beyond fee administration.[30] Even NARUC concedes that states are not in a position to take on the regulation of intrastate IP CTS.[31] In sum, *not one commenter* supports the immediate or near-time transition of intrastate IP CTS to the states and not one believes it can be done in a timely efficient manner. Accordingly, we believe that a decision to transfer administration to the states or even a decision to further explore this issue cannot take the place of the reform recommended by the Commission.

CONCLUSION

In conclusion, IDT reiterates that the Commission has explicit, expansive authority under §§ 225(b)(2) and 225(d)(3) of the Act to implement TRS contribution reform. The single-factor contribution methodology is more practical, can be implemented more quickly, and should be implemented for the upcoming TRS funding year. If the Commission wishes to consider other contribution reform measures that require referral to a Federal-State Joint Board, the Commission must first adopt the single-factor methodology as an interim improvement in the equity, reasonableness, and economic efficiency of the TRS contribution methodology until a permanent methodology that incorporates any Joint Board recommendations can be implemented.

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[30] PA PUC Comments at 14.

[31] NARUC Comments at 9-10.